83-1071

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS CARL MCGINTY
and
JUDITH MCGINTY,

Petitioners,

v.

ARLO SMITH, DISTRICT ATTORNEY
OF SAN FRANCISCO, CALIFORNIA
ex rel. JOHANNA MARIE MCGINTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. May a State court give retroactive application to a statutory change in the homestead exemption and thus impair and destroy petitioner's contract to sell their home in California and purchase another in Wisconsin with the proceeds?

2. May a state by long established judicial practice enforce support obligations which are owed to a first wife against the community property of a second marriage, without giving to the second wife notice and opportunity to be heard?

3. May a state give retroactive effect to a statutory change in the Homestead Exemption allowing the first wife to take the home or the proceeds of the sale thereof of the second wife and thus impair petitioners' community property marriage contract to share their earnings and to use the same to acquire and dispose of property jointly and to share the proceeds thereof?

TABLE OF CONTENTS

TABLE OF CITATIONS

Table of Authorities Continued

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ARLO SMITH, DISTRICT ATTORNEY
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioners pray for a writ of Certiorari to issue to review the Order Denying Hearing After Judgment by the Court of Appeal 1st District Division 4 sustaining a judgment of said Court by the Supreme Court of California.

OPINION BELOW

The Court of Appeal of the State of California, First Appellate District, Division Four by a unanimous decision reversed an Order of the Superior Court of the State of California in and for the City and County of San Francisco, on August 9, 1983. A Petition for Hearing in the Supreme Court of California was denied, with one Justice disagreeing on October 6, 1983.

JURISDICTION

The decision and orders of the said California Courts enforce California Statutes in such a way as to be unconstitutional and void, in that they violate the provision of Article I section 10 of the federal Constitution that a State shall not impair the obligations of contracts and also they violate the due process clause of the Fourteenth Amendment to the Constitution. That said violations are worthy of examination by this Court as a proper exercise of its jurisdiction over state courts. Jurisdiction is invoked under Title 28 United States Code sec. 1257(3).

STATUTES INVOLVED

In 1982 California enacted the California Enforcement of Judgment Law which became operative on July 1, 1983, this law changed the California Homestead Act:

(a) The former statute:

California Civil Code sec. 1260. [Operative until July 1, 1983.] Value of Homestead Allowed.

(a) Homestead may be selected and claimed:

1. By any head of a family, of not exceeding forty-five thousand dollars ($45,000) in actual cash value, over and above all liens and encumberances on the property at the time of any levy of execution thereon.

2. By any person, 65 years of age or older of not exceeding forty-five thousand dollars ($45,000) in actual cash value, over and above all liens and encumberances on the property at the time of any levy of execution thereon.

3. By any other person of not exceeding thirty thousand dollars ($30,000) in actual cash value over and above all liens and encumberances.

(b) Any declaration of homestead which has been filed prior to the operative date of any amendment of

this section which increases the value of the property which may be selected and claimed as a homestead shall be deemed to be amended on such date by increasing the value of any property selected and claimed to the value pemitted by this section on such date to the extent that such increase does not impair or defeat the right of any creditor to execute upon the property which existed prior to such date. *Leg. H.* 1872, 1945 ch. 1077, effective July 2, 1947, 1949 ch. 357, 1953 ch. 943, 1963 ch. 1288, 1969 ch. 1099, 1970 ch. 319, operative Jan. 1, 1971, 1976 ch. 132, 1978 ch. 993, 1979 ch. 118, 1980 ch. 15, 1982 ch. 487, Repealed operative July 1, 1983.

Civil Code sec. 1265. [Operative until July 1, 1983.] Sale of Homestead and Exemption.

From and after the time the declaration is filed for record, the premises therein described constitute a homestead. In no case shall the homestead or the products, rents, issues or profits thereof be held liable for debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale. *Leg. H.* 1872, 1874 p. 231, 1880 p. 8, 1909 p. 972, 1911 p. 6, 1951, ch. 438, 1959 ch. 1805, 1961 ch. 636, 1980 ch. 119, 1982 ch. 497, Repealed operative July 1, 1983.

Civil Code sec. 1265a. [Operative until July 1, 1983.] Declaration of Homestead Dates Back to Original Declaration.

If the proceeds arising from the sale of property selected as a homestead are used for the purchase of real property within the period of six months following such sale, the property purchased may be selected as a homestead in the manner provided in this title within the period of six months following such sale, and such selection, when the declaration

has been filed for record, shall have the same effect as if it had been created at the time the prior declaration of homestead was filed for record. *Leg. H.* 1939 ch. 515, 1982 ch. 497, Repealed operative July 1, 1983.

(b) The present statute:

California Code of Civil Procedure sec. 704.730. [Operative July 1, 1983.] Amount of Homestead Exemption.

(a) The amount of the homestead exemption is one of the following:

(1) Thirty thousand dollars ($30,000) unless the judgment debtor or spouse of the judgment debtor whom resides in the homestead is a person described in paragraph (2).

(2) Forty-five thousand dollars ($45,000) if the judgment debtor or spouse of the judgment debtor whom resides in the homestead is either or both of the following:

(a) A person 65 years of age or older.

(b) A member of a family unit. This clause applies only if there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(b) Notwithstanding any other provision of this section the combined homestead exemption of spouses on the same judgment shall not exceed forty-five thousand dollars ($45,000), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both parties are entitled to a homestead exemption, the exemption of the proceeds of the homestead

shall be apportioned between the spouses on the basis of their proportionate interest in the homestead. *Leg. H.* 1982 ch. 1364, Operative July 1, 1983.

Code of Civil Procedure sec. 704.950. [Operative July 1, 1983.] When Judgment Lien Does Not Attach to Declared Homestead.

(a) Except as provided in subdivision (b) and (c), a judgment lien on real property created pursuant to Article 2 (commencing with section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

(b) This section does not apply to a judgment lien created under Section 697.320 by recording a certified copy of a judgment for child or spousal support.

(c) A judgment lien attaches to a declared homestead in amount of any surplus over the total of the following:

(1) All liens and encumberances on the declared homestead at the time the abstract of judgment or certified copy of the judgment is recorded to create the judgment lien.

(2) The homestead exemption set forth in Section 704.730. Leg. H. 1982 ch. 1364. Operative July 1, 1983.

In 1973 California enacted the Dymally Bill, Cal. Stats. 987 sec. 20[1] named after State Senator Mervyn Dymally a

[1] Under California law a husband by statute had management and control of the community property. This meant he could subject the community property to debt without the consent of his wife. Under

woman's rights advocate. This law gave to both spouses joint and several management and control of community property after January 1, 1975.

Three sections of the Dymally Bill are:

California Civil Code sec. 199. Dissolution of Marriage Obligation to Support.

The obligation of a father and mother to support their natural children under this chapter, including but not limited to Section 196 and 206 shall extend only to, and may satisfied only from, the total earnings, or the assets acquired therefrom, and the separate property of each, if there has been a dissolution of their marriage as specified by Section 4350. *Leg. H.* 1973 ch. 987, Operative January 1, 1975.

Civil Code section 5125. Management and Control of Community Property — Consent of Spouse to Disposition of Property.

(a) Except as provided in subdivision (b), (c) and (d) and Section 5113.5 and 5128 either spouse has the management and control of the community personal property, whether acquired prior to or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

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these statutes the husband was a trustee of the community property and could not mismanage it without repayment. The wife was similar to the beneficiary of a spendthrift trust. She could not subject the community property to her debts without the consent of her husband. If the community property became commingled she lost her right to make a claim for mismanagement. Unlike a true trustee the husband was not responsible for commingling her earnings or her share of his earnings with his community property interest and she lost all control in spite of the fact the husband-trustee had caused the commingling. See: Jack F. Bonanno, 1 *Hastings Constitutional Law Quarterly* 97 (1974) "The Constitution and Liberated Community Property in California, Some Constitutional Issues and Problems Under the Newly Enacted Dymally Bill."

(b) A spouse may not make a gift of community personal property or dispose of the community personal property, without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber community personal property, used as the family dwelling, or the furniture, furnishings or fittings of the home, or the clothing, wearing apparel of the other spouse or the minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property. *Leg. H.* 1969 ch. 1608, 1609, Operative January 1, 1970, 1973 ch. 987 Effective January 1, 1975, 1974 chs. 546, 1206, 1977 chs. 332, 692, 1982 ch. 497, Operative July, 1983.

Civil Code sec. 5127. Sale or Leasing of Community Real Property.

Except as provided in Sections 5113.5 and 5128 either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided however, that nothing herein contained shall be construed to apply to a lease, mortgage conveyance or transfer of real property or any interest in real property between husband and wife; provided also, however, the sole lease, contract, mortgage or deed of the husband

holding the record title to community property to a lessee, purchaser or encumberancer in good faith without knowledge of the marriage relations, shall be presumed to be valid if executed on or after January 1, 1975, and that the sole lease, contract, mortgage or deed of either spouse, holding the recorded title to community real property to a lessee, purchaser or encumberancer in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section affecting any property standing of record in the name of any spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situated, and no action to avoid any instrument mentioned in this section affecting any property standing of record in name of the husband alone which was executed by the husband alone and filed for record prior to the time that this act takes effect, in the recorder's office in the county in which the land is situated shall be commenced after the expiration of one year from the date on which this act takes effect. *Leg. H.* 1969 chs. 1608, 1609, Operative January 1, 1970, 1973 ch. 987 Operative January 1, 1975, 1974 ch. 1206.

STATEMENT OF CASE

In 1972 the Petitioner Thomas Carl McGinty and Johanna Marie McGinty obtained a dissolution of their marriage. Petitioner was ordered by the Court, the Superior Court of the State of California in and for the City and County of San Francisco to pay $250.00 per month for the support of the three minor children of the marriage.

In 1978, when he was already far behind in his child support payments, he married the Petitioner Judith McGinty and together they purchased a home in San Mateo County, California with their joint earnings. In

1980 they filed a declaration of homestead on the real property.

In 1981 they sold their home in California and purchased a home in Wisconsin which was protected by the homestead statute of that state. The money received from the sale of one home was to be used to purchase the other.

The money from the sale of the California home due to petitioners after payment of all purchase money liens was in the possession of the escrow holder a title company. It was $18,754.06. The District Attorney of San Francisco acting under court order on behalf of the first spouse Johanna Marie McGinty sought to collect the fund based on a judgment lien for the unpaid child support in amount of $18,247.11. This judgment lien was recorded after the homestead declaration in San Mateo County.

Petitioner appeared in the Superior Court in San Francisco and moved for an order to compel payment of the fund to him and his wife on the grounds that it was exempt from the judgment lien under the applicable California homestead law.

The trial court agreed and ordered the fund held by the Court on stipulation of the parites, paid over to Petitioners. The District Attorney appealed and the California Court of Appeal, First Appellate District, Division Four first issued a Writ of supersedeas impounding the fund, and then two years later a decision stating that the trial court had not properly exercised its discretion to deny homestead exemption to Petitioners who were wrongdoers for not obeying the order to pay child support. (See: Exhibit A.)

While the appeal was pending the California Legislature enacted and the governor signed into law a stataute

which provided that homestead exemption no longer protected from a child support or spousal support judgment. While the Court of Appeal does not mention the new code section it became effective on July 1, 1983, and the opinion was issued on August 6, 1983.

REASONS FOR GRANTING THE WRIT

1. The issues involve State impairment of the obligation of contract in violation of Aritcle I section 10 of the federal Constitution wherein the State of California by statutory enactment wholly destroyed Petitioners'right to purchase, own, sell and repurchase another home.

2. The issues involve the due process right of the wife of a second marriage to have notice and opportunity to appear when her interest in the community property is taken to satisfy a support judgment of her husband's first marriage.

LEGAL ARGUMENT

1. In This Case The California Court Of Appeal Gave Retroactive Application To A Change In The Homestead Exemption Statute Disallowing The Exemption To Family Support Judgments. The Opinion Shows There Was No Pressing Need For The Change In Homestead Exemption Which Wholly Destroyed Petitioners' Contracts.

A close case to the case before the Court is the Federal bankruptcy case of *In re La Fortune* (9th Cir. 1980) 652 F.2d 842, in which California had enacted an extension of homestead protection to debtors who had not filed homestead declarations.[2] This federal Appeals Court held that retroactive application of this law is an impairment of the obligation of contract to creditors whose liens were wholly destroyed and unconstitutional.

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[2] California Code of Civil Procedure sec. 690.235 giving automatic homestead exemptions. Now Code of Civil Procedure sec. 690.31.

The federal Court held that there could be no retroactive application of the statute without some showing of a pressing need therefor. The general desire of the legislature and Courts to extend homestead protection to those debtors who had not filed homestead declarations was insufficient. It was not shown, said the Court, that there were a large number of persons facing forclosure of their homes if the statute were not given retroactive effect. Just as in the case at bench there was no showing or even a statement by the California Court of Appeal that children of first marriages were being deprived of support by home purchases of second families. The decision is based apparently, on a general desire to help one group of citizens over another. The federal Court cited:

W. B. Worthen Co. v. *Thomas* (1934) 292 U.S. 426, 433, 54 S.Ct. 816, 78 L.Ed. 1344

Allied Structural Steel Co. v. *Spannus* (1978) 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed. 727

Edwards v. *Kerzey* (1878) 96 U.S. 595, 24 L.Ed. 793

Medical Finance Association v. *Wood* (1936) 20 Cal. App. 2d Supp. 749, 63 P.2d 1219

Further the federal Appeals Court held the statutory change violated Article I section 10 of the Constitution not only because there was no pressing need of it, but also because it basically changed existing contract relationships in the validity construction, discharge and enforcement of contracts. Citing:

United States Trust Co. v. *New Jersey* (1977) 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed. 2d 92

Allied Structural Steel Co. v. *Spannus supra.*

Home Building & Loan Assoc. v. *Blaisdell* (1934) 290 U.S. 398.429, 54 S.Ct. 231, 236, 78 L.Ed. 413

W. B. Worthen C. v. *Thomas supra.*

W. B. Worthen Co. v. *Kavanaugh* (1935) 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298

Trigle v. *Acme Homestead Assoc.* (1936) 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575

El Paso v. *Simmons* (1965) 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed. 2d 446

The change in the California homestead exemption by Code of Civil Procedure sec. 704.950(b) doing away with the exemption for child support wholly destroyed Petitioners' sale of one home and purchase of another with the proceeds. This was done by stay on appeal and delay in the decision of the California Court of Appeal until after the new statute came into operation.

The reasons given by the California Court of Appeal for the denial of homestead exemption to support judgments shows no pressing need for it, for it comes down to the point that the Court of Appeal considered Petitioners wrongdoers, unworthy of the protection of homestead. In reality what the Court did and what the California Legislature did previously was to place a disability on second marriages as a matter of state policy by taking away the homestead exemption, the only real protection a second wife had for her earnings and share of the community property of her marriage.

California and several other states have a community property system in which married couples enter into an agreement on marriage to share their earnings and property acquired during the marriage. Mr. B. E. Witkin the leading commentator on California law likens the relationship to a "partnership." (See: *Witkin Summary of California Law* 6th ed. 1974, Bancroft-Whitney Co. S.F. Vol 7 "Community Property" secs. 1, 2 and 3 pp. 5094-5096.) But California differs from other community prop-

erty jurisdictions, historically,[3] in that its Courts have refused for many years to give a wife standing to assert her community property interests when community property was used to satisfy her husband's prior obligations.

2. Under Court Created Practice In California The Wife Of A Second Marriage Has No Right To Notice Or Opportunity To Appear To Assert Her Interest In Community Property Which Is Taken To Pay Pre-Marital Support Obligations Of Her Husband.

In the earliest pleadings in this case Petitioners' counsel pointed out to the trial Court the provisions of the Dymally Bill asserting that Petitioner Judith McGinty was an unnamed proper party. The District Attorney answered that the California courts have for 45 years "in an unbroken line of cases" not allowed a wife standing to contest seizure of community property to satisfy the premarital support obligations of her husband. Citing among other cases: *Weinberg* v. *Weinberg* (1967) 67 Cal. 2d 557, 562-564, 63 Cal. Rptr. 13, 432 P.2d 700 and *In re Marriage of Smaltz* (1978) 82 Cal. App. 3d 568, 147 Cal. Rptr. 154.[4]

In the *Smaltz case* and in the most recent case *Gunn* v. *United Airlines* (1982) 138 Cal. App. 3d 765, 188 Cal.

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[3] See: *Spreckels* v. *Spreckels*, (1897) 116 Cal. 339, 48 Pac. 228, 36 L.R.A. 497, 58 Am. St. Rep. 179 and the comment of Professor Bonanno Vol 1 *Hastings Constitutional Law Quarterly* pp. 110-112, on *Warburton* v. *White* (1900) 176 U.S. 484, 491, 20 S.Ct. 404, 44 L. Ed. 555 and the Opinion of Holmes J., and the two line dissent of McKenna J. in *Arnett* v. *Reade* (1911) 220 U.S. 311, 31 S. Ct. 425, 55 L. Ed. 477, 36 L.R.A. 1040 and the effect of the Dymally Bill in California Infra. fn. 1.

[4] Record on Appeal in this case *Marriage of McGinty* Cal. Ct. of App. 1st Dist. Div. 4 No. 1 Civil 54377 - A014501 "Notice of Motion to Release Funds, filed Oct. 23, 1981. "Opposition to Notice of Motion to Release Funds" filed Nov. 13, 1981.

Rptr. 302, the reasons are given for California Courts not allowing the wife to appear and defend:

> (1) "Because the community is entitled to reimbursement rather than the wife." *Smaltz*
>
> (2) The husband would thus be allowed "to halve his contractual and judgment imposed obligations to his ex-wife by the simple expedient of marriage."

The first reason treats the second wife as having no vested interest in the community property and the second reason treats her as a "non-person." She doesn't exist in the view of the Court except as an excuse to avoid support payments. This is truly unfair. In this case for example Judith McGinty's name was on the real property as a joint tenant, her named appeared on the homestead declaration, on the contracts of sale and purchase, and on the funds in the hands of the escrow holder. She was a full owner of the real estate and the money.

The California practice clearly violates the rule of *Sniadach* v. *Family Finance Corp.* (1969) 393 U.S. 377, 89 S.Ct. 1820, 23 L.Ed.2d 349 even to the seizure of the original fund and the impounding of the money by the writ of Supersedeas of the Court of Appeal.

The District Attorney states that this situation has been going on since 1938, in point of fact it has existed since 1897 at least and is peculiar to California. (See fn.3 infra.)

While the second wife is by statute since 1975 half owner with a joint, several and equal right to manage the community property of her marriage with her husband this has not been recognized by the California Courts as giving her a right to notice and opportunity to be heard when the community property is taken and disposed of by Court action.

CONCLUSION

The two major problems present in this Petition as to State impairment of contract obligation in violation of Article I section 10 of the United States Constitution and the denial of Fourteenth Amendment procedural due process are really the same problem.

The homestead exemption from support payments of a prior marriage of the husband was about the only protection a second wife had under California Law and practice. Now that too is gone.

If the state allowed second marriages and homestead exemption to protect the homes acquired by the parties, it should be required to continue that protection at least to those persons who relied in purchase of houses prior to the change in the law. Further, so long as the State refuses to recognize the right of second wives to appear in its Courts by giving them no notice and hearing on the taking of their property, it places a disability on second marriages.

These questions are of Constitutional significance and of interest to a large number of persons. The writ of Certiorari should issue in this case.

Respectfully submitted,

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For Petitioners.

EXHIBIT

EXHIBIT - A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

A 014501
1 Civil No. 54477
(Sup. Ct. No. 628,961)

In re Marriage of JOHANNA MARIE MCGINTY,
and THOMAS CARL MCGINTY,

JOHANNA MARIE MCGINTY,

Appellant,

v.

THOMAS CARL MCGINTY,

Respondent.

FILED
Aug. 9, 1983
Court of Appeal
First App. Dist.
Cliffor C. Porter, Clerk

Appellant Johanna McGinty and respondent Thomas Carl McGinty's marriage was dissolved in June 1972. Pursuant to the interlocutory decree of divorce, respondent was ordered to pay support for the three minor children of the marriage in the sum of $250 per month.

Respondent remarried after the dissolution of marriage. On June 8, 1978, respondent purchased property in Daly City, and filed and recorded a declaration of homestead on the property on October 13, 1980.

Respondent had failed to keep his child support payments up to date. On May 13, 1981, the District Attorney of San Francisco, pursuant to appellant's request, was ordered to appear on

her behalf to enforce the child support order. (Civ. Code § 4702.)[1]

On May 14, 1981, the district attorney recorded the interlocutory judgment of dissolution and order for child support enforcement in San Mateo County, the location of respondent's property pursuant to Code of Civil Procedure section 674.5. This established a lien on respondent's property in the amount of $18,247.11.

On September 15, 1981, respondent entered into an agreement to sell the Daly City property for $120,000. After payment of all superior liens on the property, the balance available to be paid to respondent was $18,754.06. The escrow holder for the sale learned of the child support lien on the property, and asked the district attorney for clarification. The district attorney informed the escrow holder of the lien's amount.

The escrow holder was unwilling to close the escrow until the validity of the child support lien was determined, so respondent filed a motion for delivery of the $18,754.06 into court. The motion was initially opposed by appellant, but the parties subsequently entered into a stipulation concerning the motion. The stipulation provided that the sum of $18,754.06 would be paid into court, subject to the court's determination of its proper distribution. Respondent also stipulate that the amount of the arrearages was $18,575.15.

After the stipulation was entered into, respondent filed a motion to release the deposited funds to him. Appellant opposed the motion on the ground that respondent stood in contempt of the court order for support and that the court should withhold the exercise of its powers until respondent purged himself of the contempt. Simultaneously, the district attorney file an order to show cause re contempt.

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[1] Unless otherwise indicated, all future references will be made to the Civil Code.

At the hearing on respondent's motion appellant argued that the court had discretion to deny assistance to respondent and that due to the fact that respondent was in violation of the support order the court should exercise its discretion by witholding the funds. After hearing the arguments of the parties the court concluded that it had no discretion to withold the funds in dispute because the homestead had unquestionable priority over the judgment lien for child support. Consistently therewith, the court granted the release of the funds to respondent.

Appellant has appealed from this order.[2] Appellant's motion to stay order was granted pending this court's determination of the appeal.

Appellant does not dispute that the homestead was validly declared and recorded under the statute (§ 1237 et seq.); that the homestead was established prior to the recordation of the judgment lien for child support and hence was exempt from execution under the junior lien. (§ 1241; Engelman v. Gordon (1978) 82 Cal. App. 3d 174, 178-179; Swearingen v. Byrne (1977) 67 Cal. App. 3d 580, 584); and that the proceeds deposited with the court were fully exempt from creditors' attachment (§§ 1260, 1265). Appellant's sole contention on appeal is that notwithstanding these facts the trial court, proceeding as a court of equity, was authorized to deny respondent any assistance because the latter was held in contempt of a court decree ordering child support payments. Since the trial court arrived at its decision without recognizing that it had discretion to do otherwise and thus without exercising its discretion, appellant claims that the order releasing the funds to respondent is fatally flawed and should be reversed. Appellant's position is meritorious.

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[2] As appellant aptly points out, the order at bench is appealable as a post-judgment order under Code of Civil Procedure section 904.1, subdivision (b) and the case authorities thereunder. (Baum v. Baum (1959) 51 Cal. 2d 610 614-615; In re Marriage of Schultz (1980) 105 Cal. App. 3d 846.

The present appeal is from an order granting respondent's motion to release funds on deposit. It is well settled that one invoking the aid of a court should submit himself to all legitimate orders and processes of the court. Consistently therewith, it has been said that no party to an action can ask the aid and assistance of a court in hearing his demand while he stands in an attitude of contempt to its legal orders and processes. (McPherson v. McPherson (1939) 13 Cal. 2d 271, 277; Pearson v. Superior Court (1939) 32 Cal. App. 2d 87, 89, Ross v. Ross (1941) 48 Cal. App. 2d 72, 78.)

This basic principle of equity has been applied in a great variety of cases, including instances where the party to the action was entitled to relief as a matter of law. (i.e., Stone v. Bach (1978) 80 Cal. App. 3d 442; Estate of Scott (1957) 150 Cal. 2d 590; Moterey Coal Co. v. Superior Court (1909) 11 Cal. App. 207; see also Hull v. Superior Court (1960) 54 Cal. 2d 139; Travis v. Travis (1948) 89 Cal. App. 2d 292; Ross v. Ross, *supra*. 48 Cal. App. 2d 72.

The case especially in point is *Weeks* v. *Superior Court* (1921) 187 Cal. 620. In *Weeks*, the wife sought a writ of mandate to compel the court to grant her a final decree of divorce. The Superior Court refused to act because the wife wilfully disobeyed the order of the court relating to the custody of the child and thus was in contempt of the court. In denying the writ the Supreme Court reiterated that " 'No rule of law seems more widely prevalent and better established than that a court whose authority has been put to naught will extend no favors or privileges to the party in contempt until he has acknowledge its authority by purging the offense.' " (p. 672.) Moreover, citing *State ex rel. Hunter* v. *Ronald* (Wash. 1919) 180 Pac. 125, the Supreme Court emphasized that if the party has absolute right to the relief sought, the court may deny the relief to the party in contempt until he clears himself of that contempt. (Weeks, at p. 623.)

Respondent's assertion that his failure to pay child support cannot be used to defeat his homestead right because he has not

normally been found in contempt must be rejected. As the court stated in *Knacksted* v. *Superior Court* (1947) 79 Cal. App. 2d 727, 729' "But it is equally well settled that where a final decree is requested, and it appears that the party requesting the entry of the final decree is in default, and where it appears from the evidence then presented that the petitioner had or has the ability to comply with the order, even though there has been no prior adjudication of contempt and none is sought, the trial court is justified in denying the request to enter the final decree of divorce."

In the case at bench, the record shows that appellant filed at least four application for orders to show cause re contempt between October 22, 1976 and November 4, 1981. The record likewise demonstrates that respondent stipulated that accumulated arrearages amounted to $18,575.15 at the time the stipulation was signed and also according to his own statement respondent and his wife had a combined net income of approximately $2,300 per month (of which respondent's net monthly income was $1,625). This evidence clearly establishes that respondent did have ability to comply with the support order of the court but neglected and failed to do so. There exists ample evidence from which the trial court could conclude that respondent is now in contempt of the support order.

In sum, the foregoing discussion shows that the trial court was vested with discretion to withold the funds deposited with the court despite the fact that the moneys constituted homestead funds exempt from execution under the California law. The record likewise reveals that the trial court harbored the erroneous belief that it had no discretion in the matter and that due to this erroneous assumption the trial court did not exercise its discretion as to whether the funds should be released to respondent. Since, under the circumstances here presented the trial court's failure to exercise its discretion was clearly prejudicial (Schweiger v. Superior Court (1970) 3 Cal. 3d 507), we were impelled to reverse the order.

The order filed December 17, 1981, releasing funds to respondent is reversed. The cause is remanded to the trial court for further proceedings consistent with this opinion.

Caldecott, P.J.

We concur:

Rattigan, J.
Schwartz, J.

EXHIBIT - B

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4 Civil No 54377, A014501
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

IN RE THE MARRIAGE OF MCGINTY

MC GINTY

v.

MC GINTY

Respondent's petition for hearing DENIED.

Broussard, J., is of the opinion the petition should be granted.

BIRD
Chief Justice